

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

OPTISTREAMS, INC.,	)	No. CV-F-05-0117 REC SMS
)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION TO DISMISS THE FOURTH
vs.	)	CLAIM FOR RELIEF OF
	)	DEFENDANT'S SECOND AMENDED
SEAN GAHAN and DOES 1 through	)	COUNTERCLAIM. (Doc. 74)
25, inclusive,)	
	)	ORDER GRANTING PLAINTIFF'S
Defendants.	)	MOTION TO VOLUNTARILY DISMISS
	)	ITS COMPLAINT WITHOUT
	)	PREJUDICE. (Doc. 68)

ORDER GRANTING PLAINTIFF AND
PLAINTIFF'S COUNSEL'S MOTION
TO QUASH SUBPOENA. (Doc. 92)

ORDER GRANTING DEFENDANT'S
COUNSEL'S MOTION TO QUASH OR,
IN THE ALTERNATIVE, MODIFY
PLAINTIFF'S SUBPOENA. (Doc.
105)

On March 13, 2006, the Court heard (1) Plaintiff
OptiStreams, Inc.'s Motion to Dismiss Sean Gahan's Fourth Claim
for Relief Pursuant to Rule 12(b)(6), (2) Motion to Voluntarily
Dismiss Its Complaint without Prejudice Pursuant to Rule
41(a)(2), and (3) Motion to Quash Subpoena, and (4) Sean Gahan's
Motion to Quash or, in the Alternative Modify Plaintiff's

1 Subpoena. Upon due consideration of the written and oral
2 arguments of the parties and the record herein, the Court GRANTS
3 the motions, as set forth herein.

4 **I. Factual Background**

5 Defendant and Counter-Claimant Sean Gahan ("Mr. Gahan")
6 worked as a computer programmer for Plaintiff and Counter-
7 Defendant OptiStreams, Inc., ("OptiStreams") from August 2002
8 through September 30, 2004.

9 OptiStreams alleges that, on or about July 15, 2004, Mr.
10 Gahan accessed OptiStreams' computer network and electronic
11 database to tamper with data it contained and caused harm to
12 electronic storage files. OptiStreams also alleges that, in or
13 around August 2004, Mr. Gahan falsely told a third party that
14 OptiStreams was insolvent and could not pay its bills.
15 On August 30, 2004, Mr. Gahan gave OptiStreams notice that he was
16 resigning effective September 30, 2004. Before Mr. Gahan's
17 employment ended, OptiStreams asked him to sign a declaration.
18 Mr. Gahan claims that the declaration contained false and
19 misleading statements.

20 Mr. Gahan claims that, on or around October 18, 2004, and on
21 other occasions, agents of OptiStreams told third parties that
22 Mr. Gahan had wrongfully engaged in computer hacking, that a
23 criminal investigation had implicated Mr. Gahan, and that Mr.
24 Gahan had failed to sign a truthful declaration arising from the
25 incident. Mr. Gahan alleges that Steve Genuser, an OptiStreams
26 employee, made statements about him in a memorandum of October

1 18, 2004. Mr. Gahan alleges that these claims were false and
2 injured his reputation.

3 **II. Procedural History**

4 On September 30, 2004, OptiStreams filed a lawsuit in Fresno
5 County Superior Court (the "Superior Court Action") against
6 former employees Ryan McMurray, Adam Nostrant, and Josh Golding.
7 OptiStreams Inc. v. Network Innovation, 04 CE CG 02822.

8 On December 22, 2004, in a separate action, OptiStreams sued
9 Mr. Gahan in the Superior Court of California in Fresno.

10 OptiStreams alleged causes of action for slander, breach of
11 fiduciary duty/duty of loyalty, trespass to chattels, computer
12 tampering, and conversion. On January 24, 2005, Mr. Gahan
13 removed the action to this Court and filed a counterclaim for
14 damages. The counterclaim featured the following causes of
15 action: waiting time penalties under California Labor Code
16 section 203, penalties for failure to provide COBRA notice under
17 29 U.S.C. section 1132, defamation, and retaliation/abuse of
18 process. Mr. Gahan filed an his First Amended Counterclaim
19 ("FAC") on August 26, 2005.

20 On October 19, 2005, OptiStreams filed a motion to dismiss
21 the Fourth Claim for Relief of the FAC, arguing that it failed to
22 state a claim for retaliation or abuse of process. On December
23 7, 2005, the Court granted the motion to dismiss. On December
24 15, 2005, Mr. Gahan filed a Second Amended Counterclaim ("SAC"),
25 which featured a claim for abuse of process.

26 On December 28, 2005, OptiStreams filed a Motion to

1 Voluntarily Dismiss Its Complaint Without Prejudice. On January
2 3, 2006, OptiStreams filed a motion to dismiss the Fourth Claim
3 for Relief of the SAC, claiming that Mr. Gahan had again failed
4 to state a claim for abuse of process.

5 Mr. Gahan has opposed both motions. In opposition to
6 OptiStreams' motion to dismiss its own Complaint, Mr. Gahan
7 requests that the Court condition dismissal on payment of Mr.
8 Gahan's attorney's fees and costs and on a requirement that
9 OptiStreams refile any new action in this case before this Court.
10 With respect to OptiStreams' motion to dismiss the SAC's Fourth
11 Claim, Mr. Gahan contends that he has stated a claim for abuse of
12 process. OptiStreams has filed a Motion to Strike portions of
13 declarations Mr. Gahan submitted in opposition to the Motion to
14 Voluntarily Dismiss, based on a lack of personal knowledge, the
15 best evidence rule, the hearsay rule, and failure to authenticate
16 documents.

17 Mr. Gahan issued a subpoena to OptiStreams and its counsel
18 Trial & Technology Law Group ("TTLG") on January 23, 2006. On the
19 same day, OptiStreams issued a subpoena to Sagaser, Jones &
20 Haahes ("SJH"), counsel for Mr. Gahan. Both subpoenas sought
21 documents related to opposing counsel's legal representation in
22 this matter.

23 On January 27, 2006, OptiStreams and its counsel filed a
24 Motion to Quash Subpoena, based on several objections. On
25 February 16, 2006, Mr. Gahan filed a Motion to Quash or, in the
26 Alternative, Modify Plaintiff's Subpoena. Each party has opposed

1 the respective Motions to Quash.

2 **III. Motion to Dismiss Fourth Claim for Relief in SAC**

3 **A. Legal Standard**

4 Dismissal of a complaint pursuant to Rule 12(b)(6) is proper
5 if "it appears beyond doubt that the plaintiff can prove no set
6 of facts in support of his claim which would entitle him to
7 relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2
8 L. Ed. 2d 80 (1957). In testing the sufficiency of a complaint
9 against a Rule 12(b)(6) challenge, a court must "accept all
10 material allegations in the complaint as true and construe them
11 in the light most favorable to the plaintiff." N. Star Int'l v.
12 Ariz. Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). The Court
13 need not, however, "accept legal conclusions cast in the form of
14 factual allegations if those conclusions cannot reasonably be
15 drawn from the facts alleged." Clegg v. Cult Awareness Network,
16 18 F.3d 752, 754-55 (9th Cir. 1994).

17 A complaint may be dismissed as a matter of law if there is
18 a lack of a cognizable legal theory or if there are insufficient
19 facts alleged under a cognizable legal theory. Balistreri v.
20 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The
21 Court must determine whether or not it appears to a certainty
22 under existing law that no relief can be granted under any set of
23 facts that might be proved in support of a plaintiff's claims.
24 De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978), cert.
25 denied, 441 U.S. 965, 99 S. Ct. 2416, 60 L. Ed. 2d 1072 (1979).
26

1 **B. Abuse of Process**

2 In the First Amended Counterclaim, Mr. Gahan's Fourth Claim
3 for Relief encompassed two types of claims: retaliation and
4 abuse of process. The Court dismissed the Fourth Claim because
5 Mr. Gahan had failed to state a claim on either basis. The SAC
6 features a Fourth Claim for abuse of process, only.

7 “To state a cause of action for abuse of process . . . a
8 plaintiff must allege (1) the defendant's ulterior motive in
9 using the process, and (2) the use of the process in an unlawful
10 manner.” Carney v. Rotkin, Schmerin & McIntyre, 206 Cal. App. 3d
11 1513, 1525 (1988); Spellens v. Spellens, 49 Cal.2d 210, 231
12 (1957).

13 The Court dismissed the abuse of process claim in the FAC
14 because Mr. Gahan failed to allege that OptiStreams engaged in
15 any “willful act . . . not proper in the regular conduct of the
16 proceeding.” See Oren Royal Oaks Venture v. Greenberg, Bernhard,
17 Weiss & Karma, Inc., 42 Cal. 3d 1157, 1168-69 (Cal. 1986); see
18 also Bidna v. Rosen, 19 Cal. App. 4th 27, 40 (1993) (husband did
19 not state a cause of action for abuse of process where he alleged
20 that defendant wife filed six custody actions and that she would
21 continue reopening cases until husband “gave up” custody of their
22 child on ground that filing the actions did not amount to “misuse
23 of the tools the law affords litigants once they are in a
24 lawsuit”).

25 In its order granting OptiStreams' motion to dismiss, the
26 Court noted that the requirement that an abuse of process claim

1 not lie for merely filing or prosecuting a lawsuit serves the
2 important policy interest of balancing "the freedom of an
3 individual to seek redress in the courts and the interest of a
4 potential defendant in being free from unjustified litigation."
5 Order Granting OptiStreams' Mot. to Dismiss ("Order") 7:10-12
6 (quoting Oren Royal Oaks, 42 Cal. 3d at 1169). This is because
7 an action for improper filing and maintenance of a lawsuit must
8 be in the form of claim for malicious prosecution, which requires
9 a showing that the action was brought without probable cause.
10 Id. at 1169-70. An abuse of process claim does not require a
11 showing of lack of probable cause. Id.

12 In the SAC, Mr. Gahan still fails to allege that OptiStreams
13 has engaged in any improper conduct in the course of the
14 litigation. Despite the Court's admonishment that an abuse of
15 process claim requires that the offending party "did something
16 more than simply file and maintain a lawsuit with an improper
17 purpose" (Order 6:26-7:2), Mr. Gahan continues in the SAC to
18 allege just that. Nowhere in the amended Fourth Claim does Mr.
19 Gahan allege that OptiStreams has engaged in improper or abusive
20 litigation conduct. Rather, he still claims that "Gahan was sued
21 in this action because he refused to sign the declaration in the
22 other legal proceeding" (SAC ¶ 26), that "one of the reasons he
23 is being sued is to influence the testimony" in the Superior
24 Court Action (id.), that "the filing of the lawsuit" constitutes
25 an abuse of process (id. at ¶ 27), and that "the retaliatory
26 institution of the present legal action" caused him emotional

1 distress (id. at ¶ 28). Mr. Gahan does not point in the Fourth
2 Claim to any acts by OptiStreams other than filing this lawsuit
3 and filing the Superior Court Action.

4 Mr. Gahan claims that the SAC does allege a wrongful act by
5 OptiStreams: "witness tampering." Opp'n 4:22-23. Mr. Gahan
6 argues that the SAC alleges that OptiStreams "filed this lawsuit
7 with an ulterior and improper motive, and with the distinct
8 purpose of intimidating Gahan with the intent to influence or
9 prevent his testimony" in the Superior Court Action. Id. at
10 4:25-27 (emphasis in original). Mr. Gahan contends that filing
11 this lawsuit "with the intent to 'witness tamper'" amounts to a
12 willful act distinct from filing and maintaining the action. Id.
13 at 4:27-5:1.

14 Mr. Gahan is still alleging the same conduct by OptiStreams
15 as it did in the FAC: filing the lawsuit. At oral argument, Mr.
16 Gahan even admitted that the allegations in the SAC referred to
17 the "same conduct" that he alleged in the FAC. Simply ascribing
18 a new motive to OptiStreams' filing of this lawsuit does not
19 satisfy the requirement under California law that an abuse of
20 process claim allege more than "the mere filing or maintenance of
21 a lawsuit." Oren Royal Oaks, 42 Cal. 3d at 1169. "[A]buse of
22 process claims typically arise for improper or excessive
23 attachments or improper use of discovery." Bidna, 19 Cal. App.
24 4th at 40 (internal citations omitted); see, e.g., White Lighting
25 Co. v. Wolfson, 68 Cal. 2d 336 (1968) (attachment of employee's
26 automobile bore no relation to his alleged liability); Younger v.

1 Solomon, 38 Cal. App. 3d 289 (1974) (discovery request for
2 purpose of furthering state bar disciplinary proceedings). Mr.
3 Gahan does not allege any such wrongful litigation conduct by
4 OptiStreams. Accordingly, Mr. Gahan has failed to state a claim
5 for abuse of process.

6 **C. Leave to Amend**

7 Where the complaint fails to state a claim on which relief
8 can be granted, leave to amend "shall be freely given when
9 justice so requires." Fed. R. Civ. P. 15(a); Allen v. Beverly
10 Hills, 911 F.2d 367, 373 (9th Cir. 1990). "The district court's
11 discretion to deny leave to amend is particularly broad where
12 plaintiff has previously amended the complaint." Id. (quoting
13 Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th
14 Cir. 1989)). "[A] district court does not 'abuse its discretion
15 in denying a motion to amend a complaint . . . when the movant
16 presented no new facts but only "new theories" and "provided no
17 satisfactory explanation for his failure to fully develop his
18 contentions originally.'" Allen, 911 F.2d 367 at 374 (quoting
19 Vincent v. Trend W. Technical Corp., 828 F.2d 563, 570-71 (9th
20 Cir. 1987)).

21 Here, Mr. Gahan has twice amended his counterclaim. The
22 Fourth Claim for Relief, as amended in the SAC, contains the same
23 defects that the Court pointed out when it dismissed the FAC.
24 The SAC contains no new facts indicating that OptiStreams engaged
25 in improper conduct apart from filing and maintaining the
26 lawsuit. The Court sees no reason to provide Mr. Gahan yet

1 another opportunity to attempt to revive his claim for abuse of
2 process.

3 Accordingly, Mr. Gahan's Fourth Claim for Relief is
4 DISMISSED WITH PREJUDICE.

5 **IV. Motion to Voluntarily Dismiss Complaint**

6 **A. Voluntary Dismissal under Rule 41(a)(2)**

7 Federal Rule of Civil Procedure 41(a)(2) provides that,

8 [e]xcept as provided in paragraph (1) of this
9 subdivision of this rule, an action shall not
10 be dismissed at the plaintiff's instance save
11 upon order of the court and upon such terms
12 and conditions as the court deems proper.
13 . . . Unless otherwise specified in the
14 order, a dismissal under this paragraph is
15 without prejudice.

16 A decision to grant a motion to dismiss under Rule 41(a)(2) lies
17 within the sound discretion of the trial court. Stevedoring
18 Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir.
19 1989). Before dismissing the action, the court must determine
20 whether the defendant would suffer some plain legal prejudice.
21 Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir. 1994);
22 Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th
23 Cir. 1982); see also Westlands Water Dist. v. United States, 100
24 F.3d 94, 97 (9th Cir. 1996) (factors to consider include whether
25 dismissal would result in the loss of a federal forum, the right
26 to a jury trial, or a statute of limitations defense). The
prospect of a second lawsuit does not constitute plain legal
prejudice, nor does the fact that the defendant has already
incurred substantial expenses. Hamilton, 679 F.2d at 145; In re

1 Lowenschuss, 67 F.3d 1394, 1400-01 (9th Cir. 1995) (citing Hyde &
2 Drath, 24 F.3d at 1169); see also Am. Nat'l Bank & Trust Co. v.
3 Bic Corp., 931 F.2d 1411, 1412 (10th Cir. 1991) ("The possibility
4 that plaintiffs may gain a tactical advantage by refiling in
5 state court is insufficient to deny a voluntary motion to dismiss
6 without prejudice, especially when state law is involved.").

7 Mr. Gahan does not allege in his Opposition that he will
8 suffer any legal prejudice if OptiStreams voluntarily dismisses
9 the action. He does contend that such dismissal requires him to
10 defend "against entirely new allegations" if a new action is
11 filed against him (Opp'n to Mot. to Voluntarily Dismiss 1:26)
12 and may be forced to litigate in two different fora
13 simultaneously (id. at 1:26-27).

14 For the first time at oral argument, Mr. Gahan contended
15 that voluntary dismissal was inappropriate because it deprived
16 him of a federal forum. He stated that he would be prejudiced
17 because OptiStreams would assert in the Superior Court Action
18 what should be a compulsory counterclaim in this action. He
19 cited in support Rule 13(a) of the Federal Rules of Civil
20 Procedure,¹ which requires parties who face claims in a

21 ¹Rule 13(a) of the Federal Rules of Civil Procedure reads, in
22 relevant part, as follows:

23 Compulsory Counterclaims. A pleading shall
24 state as a counterclaim any claim which at the
25 time of serving the pleading the pleader has
26 against any opposing party, if it arises out
of the transaction or occurrence that is the
subject matter of the opposing party's claim
and does not require for its adjudication the

1 proceeding to introduce certain counterclaims, if at all, in the
2 same proceeding. The Court sees no reason to evaluate at this
3 stage the propriety of a future claim that OptiStreams may bring
4 in the Superior Court Action or in any other case. State courts
5 have their own procedural rules that govern compulsory cross-
6 claims and prevent multiplicity of litigation. See Cal. Civ.
7 Proc. Code § 426.30(a); Carroll v. Imp. Motors, Inc., 33 Cal.
8 App. 4th 1429, 1435-36 (1995) (holding that plaintiff who
9 voluntarily dismissed his complaint without prejudice was barred
10 under section 426.30 from bringing in another action new claims
11 arising from the same transaction as claims in defendants' cross-
12 complaint in the initial action). The Court need not alter its
13 course based on a purported risk that federal procedure might not
14 be followed in state court. Nor does the mere fact that Mr.
15 Gahan may be forced to defend in state court rather than in
16 federal court amount to legal prejudice. See Am. Nat'l Bank &
17 Trust, 931 F.2d at 1412.

18 For the first time at oral argument, Mr. Gahan also cited
19 Sizzler USA Restaurants, Inc. v. Belair & Evans LLP (In re
20 Sizzler Restaurants International, Inc.), 262 B.R. 811 (Bankr.
21 C.D. Cal. 2000). In that case, the court refused to dismiss
22 plaintiff's complaint without prejudice on the ground that doing
23 so would legally prejudice defendant by undermining any future
24 malicious prosecution claim. Id. at 823. This is because a

25 presence of third parties of whom the court
26 cannot acquire jurisdiction.

1 determination on the merits is necessary to maintain such a claim
2 under California law. Id. at 822. The court found that
3 defendant had reason to fear that a voluntary dismissal would
4 make later recovery for malicious prosecution impossible. Id.

5 The Court is skeptical of Mr. Gahan's eleventh hour
6 objection that voluntary dismissal will jeopardize a future
7 malicious prosecution claim. First, Mr. Gahan has asserted that
8 OptiStreams plans to refile its claims in the Superior Court
9 Action. Presumably, these claims will ultimately be resolved on
10 the merits, allowing Mr. Gahan to bring a malicious prosecution
11 claim if OptiStreams is unsuccessful. Moreover, as the Court
12 holds below, OptiStreams has a reasonable chance of success on
13 the merits, at least on the claims related to computer tampering.
14 Finally, while Mr. Gahan's Opposition discussed the merits of
15 OptiStreams' claims, he did not discuss the factors bearing on
16 the likelihood of success on a malicious prosecution claim, such
17 as whether OptiStreams lacked probable cause to bring these
18 claims in the first place. In fact, it was only in passing at
19 oral argument that Mr. Gahan mentioned any interest in bringing a
20 malicious prosecution claim. The Court does not find plain legal
21 prejudice in the possibility that Mr. Gahan's malicious
22 prosecution claim may be foreclosed.

23 None of Mr. Gahan's practical concerns rise to the level of
24 legal prejudice on par with loss of a federal forum, the right to
25 a jury trial, or the existence of a statute of limitations
26 defense. Accordingly, voluntary dismissal under Rule 41(a)(2) is

1 appropriate.

2 **B. Conditioning Voluntary Dismissal on Payment of Fees and**
3 **Costs**

4 In deciding to grant OptiStreams' motion for voluntary
5 dismissal, the Court must decide whether to subject the dismissal
6 to any conditions. Mr. Gahan asks the Court to condition the
7 voluntary dismissal of OptiStreams' Complaint on its payment of
8 Mr. Gahan's attorney's fees and costs. The party against whom
9 voluntary dismissal is sought is not entitled to attorney's fees
10 and costs if plaintiff had "a realistic chance of prevailing."
11 Stevedoring Servs., 889 F.2d at 922. The Ninth Circuit has not
12 defined what showing is sufficient to establish a realistic
13 chance of prevailing. The district court in Stevedoring Services
14 had already decided, after weeks of hearings, that plaintiff's
15 claims failed on the merits, though they "presented a close
16 question." Id. Thus, it appears that a "realistic chance" can
17 be established by something less than a preponderance of the
18 evidence and less even than a showing that success is more likely
19 than not.

20 **1. Claims Based on Computer Tampering**

21 The brunt of the claims in OptiStreams' Complaint are based
22 on Mr. Gahan's alleged tampering with its computers and data:
23 the Third Cause of Action for Trespass to Chattel, the Fourth
24 Cause of Action for Computer Tampering under California Penal
25 Code section 502, and the Fifth Cause of Action for Computer
26 Tampering under 18 U.S.C. section 1030. OptiStreams has

1 introduced evidence that suggests it would have a realistic
2 chance of prevailing on these claims.

3 On July 6, 2004, Mr. Gahan contacted a forum, the "XP
4 Embedded News Group," and obtained information about how a
5 software developer can move an entire database from one computer
6 to another. Gahan Decl. ¶¶ 66-67. On July 15, 2004, Mr. Gahan
7 sent an e-mail reminding himself to download a database. Kalra
8 Decl. Ex. A (Gahan Dep.) at 245:23-246:6. He admitted in his
9 deposition that the database he was referring to was "the
10 Platypus database." Id. at 250:14-15. Platypus is the name of
11 OptiStreams' accounting software, and its database includes
12 information about OptiStreams' customers, including credit card
13 numbers, contact information, contract termination dates, and
14 their requirements. Genuser Decl. ¶ 2.

15 On July 15, 2004, at 4:58 p.m., someone using the user name
16 "Prod1" logged onto OptiStreams server. Murphy Supp. Decl. ¶ 16.
17 Six minutes later, all the hard drives on the server were erased.
18 Id. The Prod1 user name gave the holder access to the entire
19 computer system. A. Haugan Supp. Decl. ¶ 3. The user name was
20 created on April 27, 2004, the day after then-network
21 administrator Ryan McMurry gave notice of his resignation from
22 OptiStreams. Murphy Supp. Decl. Ex. A; A. Haugan Supp. Decl. Ex.
23 A. Mr. McMurry, a former network administrator of OptiStreams,
24 left to found Network Innovation Associates, another computer
25 company. McMurry Decl. ¶ 3. Mr. McMurry called Mr. Gahan's
26 cellular phone eight times between July 12, 2004, and July 16,

1 2004. A. Haugan Decl. ¶ 3; Kalra Decl. Ex. 2.

2 A firewall log printed July 16, 2004, indicated that at some
3 point, an amount of data approximately equal to the size of the
4 Platypus database was downloaded to Mr. Gahan's home computer.
5 Murphy Supp. Decl. ¶ 9; Gahan Supp. Decl. ¶ 53. Because the
6 firewall log overwrote itself approximately once a day, the entry
7 indicated that Mr. Gahan had downloaded the data recently. Id.
8 at ¶ 7.

9 Mr. Gahan makes a number of contentions that he claims show
10 that OptiStreams had no realistic chance to succeed on the
11 computer tampering claims. Using his own declaration as
12 evidence, Mr. Gahan argues in his opposition brief that:

- 13 • he lacked access to the firewall log and the Prod1
14 account.
- 15 • he was not on the premises at the time of the tampering
16 and lacked the access to the server from his home.
- 17 • another OptiStreams employee or an unidentified person
18 could be the culprit.
- 19 • he had permission from Mr. McMurry (whose tenure with
20 the company had ended months before) to transfer
21 projects, such as this one, to his home computer.
- 22 • contrary to the declaration of OptiStreams' network
23 administrator (Murphy Supp. Decl. ¶ 17), the data
24 allegedly deleted was backed up on tapes.
- 25 • OptiStreams has not produced documentation detailing
26 financial damage it suffered.

- 1 • he could have copied information out of the system at
- 2 any time without leaving the evidence that was left in
- 3 this case.
- 4 • he could not have perpetrated the tampering because he
- 5 was having dinner with his wife during the time that it
- 6 occurred.

7 The Court finds that these contentions, combined with Mr.
8 Gahan's supporting declaration, do not indicate that OptiStreams
9 lacked a realistic chance of prevailing on the computer tampering
10 claims. There is a realistic chance that the trier of fact would
11 determine from the facts that Mr. Gahan entered the OptiStreams
12 server without permission, downloaded sensitive data, and then
13 erased the server hard drives to cover their tracks. There is
14 also a realistic chance that the trier of fact would disregard
15 Mr. Gahan's self-interested assertions to the contrary.²

16 **2. Claims Based on Defamation**

17 OptiStreams does not contend in any of its briefing that it
18 had a realistic chance of prevailing on its First and Second
19 Causes of Action, which depend on Mr. Gahan's allegedly
20 defamatory statements about OptiStreams. Mr. Gahan has presented
21 evidence indicating that the defamation claims would not likely
22 succeed. OptiStreams' claims that "on or about August, 2004,

23 ²The Court finds that Mr. Gahan's and Mr. Sagaser's
24 declarations, even if admitted in their entirety, do not show that
25 OptiStreams lacks a realistic chance of prevailing. Accordingly,
26 the Court need not decide, at this stage, the merits of Plaintiff's
motion to strike portions of Mr. Gahan and Mr. Sagaser's
declarations.

1 Defendant Gahan told Jack Durban that Plaintiff was insolvent and
2 could not pay its bills." Compl. ¶ 6. OptiStreams is admittedly
3 unprofitable. Genuser Decl. ¶ 1. As of June 18, 2004,
4 OptiStreams was past due on its payments to FedEx. Sagaser Decl.
5 Ex. L. These uncontroverted facts indicate that Mr. Gahan would
6 prevail on the defamation claims based on a defense of truth.
7 This, combined with OptiStreams' failure to present evidence
8 supporting its First and Second Causes of Action, leads the Court
9 to find that OptiStreams did not have a realistic chance of
10 prevailing on these claims.

11 **3. Chance of Prevailing in the Action**

12 The Court must decide whether to grant costs or attorney's
13 fees because OptiStreams lacked a realistic chance of prevailing
14 on two of their five claims. The Ninth Circuit upheld the denial
15 of costs and fees based on the district court's finding that
16 plaintiff "pursued the **action** . . . with a realistic chance of
17 success." Stevedoring Servs., 889 F.2d at 920-21 (emphasis
18 added). This language indicates that viewing the Complaint in
19 its entirety is appropriate. Such treatment seems practical in
20 light of modern litigation practice.

21 Modern pleading practice involves making claims apparently
22 supported by existing law that discovery and other developments
23 in the case may show to be ultimately unsuccessful. The Federal
24 Rules recognize the prospective nature of pleading and
25 accordingly even allow complaints featuring mutually inconsistent
26 claims to proceed past the pleading stage. See Fed. R. Civ. P.

1 8(e) (2); Isra Fruit, Ltd. v. Agrexco Agric. Exp. Co., 631 F.
2 Supp. 984, 987 (S.D.N.Y. 1986) (holding that plaintiff's claims
3 that a contract was illegal under antitrust principles and, in
4 the alternative, that plaintiff was entitled to recover under the
5 contract survived a Rule 12(b) (6) motion). Requiring the payment
6 of fees and costs for unsuccessful claims where plaintiff has a
7 realistic chance of success on other claims seems inconsistent
8 and unduly punitive based on these pleading realities.

9 Viewing an action as a whole is consistent with district
10 courts' broad discretion to deny fees to defendants when
11 plaintiffs' only partially succeed in prosecuting an action. Cf.
12 In re Corrugated Container Antitrust Litig., 756 F.2d 411, 418
13 (5th Cir. 1985) (denying Rule 54(d) costs because jury found for
14 plaintiffs in part); Sobel v. Yeshiva Univ., 619 F. Supp. 839,
15 844 (S.D.N.Y. 1985) (finding defendant was not entitled to fees
16 as a prevailing party where partial settlement substantially
17 benefitted the plaintiff class).

18 The Court finds that OptiStreams had a realistic chance of
19 prevailing in this action. If it were to succeed on its Third,
20 Fourth, and Fifth Causes of Action it might be entitled to a
21 substantial recovery. Under such circumstances, it would have
22 prevailed in this action despite the failure of the First and
23 Second Causes of Action. Accordingly, the Court declines to
24 condition voluntary dismissal of OptiStreams' Complaint on
25 payment of attorney's fees or costs.
26

C. Conditioning Voluntary Dismissal on Refiling Only in this Court

Mr. Gahan asks the Court to condition voluntary dismissal on an order that OptiStreams bring the case in this Court, if at all. Mr. Gahan cites in support Versa Prods. v. Home Depot, USA, Inc., 387 F.3d 1325 (11th Cir. 2004). There, the Eleventh Circuit held that plaintiff was not legally prejudiced by a requirement that it refile the case, if at all, in the same district court. Id. at 1329. The venue restriction was justified in that case based on an earlier district court order transferring the case based on 28 U.S.C. section 1404(a). Id. Because a district court had already decided the propriety of the new venue, the court of appeal decided that the venue condition was justified for two reasons. Id. The condition protected defendant from the unfairness of relitigating the venue issue and promoted judicial economy by maintaining the legal force of the transfer. Id.

Mr. Gahan's rationale for conditioning refiling in this Court is to relieve him of the burden of prosecuting his counterclaim in this Court and defending in another court. This argument is insufficient to support the relief Mr. Gahan requests. He does not claim that being forced to litigate in state court would divest him of the benefits of any favorable rulings. Nor does he claim that he would lose any meaningful protections of federal law. See Lawson v. Moore, 29 F. Supp. 175, 175-76 (W.D. Va. 1939). His argument is essentially that it

1 would be more convenient for the action to remain in one court.
2 A plaintiff's choice of a court or courts can often create
3 difficulties for defendants. Nevertheless, federal courts
4 accommodate these choices and use the tools at their disposal to
5 dispose of cases efficiently and justly. See McLaughlin v.
6 United Va. Bank, 955 F.2d 930, 936 (4th Cir. 1992) ("principles
7 of res judicata, collateral estoppel, and equitable stay" can
8 ameliorate the potential for future waste of judicial resources
9 in overlapping suits). The potential inconvenience of Mr.
10 Gahan's prosecuting a suit in one court and defending in another
11 does not justify the extraordinary relief of restricting
12 OptiStreams' venue choices. Accordingly, the Court declines to
13 condition voluntary dismissal on OptiStreams refiling these
14 claims in this Court.

15 **D. Costs under Rule 54(d)**

16 Additionally, Mr. Gahan seeks costs under Federal Rule of
17 Civil Procedure 54(d), which creates a presumption that the
18 prevailing party will be awarded its taxable costs. See Save Our
19 Valley v. Sound Transit, 335 F.3d 932, 944 (9th Cir. 2003); Fed.
20 R. Civ. P. 54(d)(1) ("Costs other than attorneys' fees shall be
21 allowed as of course to the prevailing party unless the court
22 otherwise directs."). Mr. Gahan also requests costs under
23 California Code of Civil Procedure section 1032, which provides,
24 in relevant part: "(b) Except as otherwise expressly provided by
25 statute, a prevailing party is entitled as a matter of right to
26 recover costs in any action or proceeding. . . ."

1 Costs may be granted to a prevailing party who files a bill
2 of costs "[w]ithin 10 days after entry of judgment" L.R.
3 54-292(b). A party against whom costs have been taxed may object
4 within 10 days of service of the bill of costs. L.R. 54-292(c).

5 Here, Mr. Gahan has not filed a bill of costs. In any
6 event, it appears doing so would be premature as the action
7 continues due to the existence of Mr. Gahan's counterclaim.³
8 Accordingly, Mr. Gahan's request for costs is DENIED as
9 premature.

10 **E. Attorney's Fees**

11 In addition to requesting that the Court condition voluntary
12 dismissal on the payment of attorney's fees under Rule 41(a)(2),
13 Mr. Gahan also argues that several other provisions entitle him
14 to attorney's fees.

15 **1. Rule 54(d)**

16 Rule 54(d)(1) only allows the prevailing party to recover
17 "costs other than attorney's fees." Rule 54(d)(2) sets forth the
18 procedure for awarding attorney's fees, but only where there is a
19 "statute, rule, or other grounds entitling the moving party to
20 the award" Rule 54(d)(2) does not itself authorize

21
22 ³The Court cannot determine the prevailing party prior to the
23 final adjudication of the counterclaim. This is because the
24 success of a counterclaim is considered along with the success of
25 a complaint in determining which is the prevailing party. See
26 Hillside Enters. v. Carlisle Corp., 69 F.3d 1410, 1416 (8th Cir.
1995) (comparing recovery on counterclaim with plaintiff's recovery
to determine prevailing party); Kalkowski v. Ronco, Inc., 424 F.
Supp. 343, 354 (N.D. Ill. 1976) (requiring each party to pay its
own costs were "there are claims and counterclaims" and the case
was "a close and difficult one").

1 attorney's fees.

2 **2. Rule 68**

3 Rule 68 sets forth certain consequences that plaintiffs face
4 when they decline a defendant's settlement offer. Rule 68
5 "applies only to offers made by the defendant and only to
6 judgments obtained by the plaintiff." Delta Air Lines v. August,
7 450 U.S. 346, 352, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981).
8 Here, OptiStreams did not obtain a judgment in its favor on the
9 claims in its complaint. Therefore, Rule 68 is inapplicable.

10 **3. California Penal Code Section 502**

11 Mr. Gahan claims he is entitled to attorney's fees under
12 California Penal Code section 502(e)(2) because OptiStreams has
13 brought a cause of action under section 502. Section 502(e)(2)
14 provides that "[i]n any action brought pursuant to this
15 subdivision the court may award reasonable attorney's fees."
16 This provision appears to authorize the court to award attorney's
17 fees to a plaintiff who prevails in an action under section
18 502(e). Mr. Gahan does not cite, and the Court is unaware of,
19 any authority for awarding attorney's fees to a defendant under
20 502(e)(1). In any event, the Court finds that awarding Mr. Gahan
21 such fees would not be "reasonable" given the strength of the
22 case that OptiStreams presented.

23 **4. California Civil Procedure Code Section 1032**

24 Mr. Gahan contends that California Civil Procedure Code
25 section 1032, which entitles a prevailing party to "recover
26 costs," also entitles that party to an award of attorney's fees.

1 Under California law, attorney's fees are distinct from costs and
2 are not awarded unless a statute or agreement of the parties
3 specifies otherwise. Cal. Civ. Proc. Code § 1021 ("Except as
4 attorney's fees are specifically provided for by statute, the
5 measure and mode of compensation of attorneys and counselors at
6 law is left to the agreement, express or implied, of the parties;
7"). Therefore, section 1032 does not authorize an award
8 of attorney's fees to Mr. Gahan.

9 **5. California Labor Code Section 2802**

10 Mr. Gahan asks the Court to order OptiStreams to indemnify
11 him for the defense of this action under Labor Code section
12 2802.⁴ Mr. Gahan does not present any authority, nor is the
13 Court aware of any, that employs section 2802 as a self-enforcing
14 attorney fee provision. Rather, it appears to provide a cause of
15 action that an employee can bring against the employer for
16 indemnity. See, e.g., Grissom v. Vons Cos., Inc., 1 Cal. App.
17 4th 52, 59 (1991) (dismissing plaintiff's claim under section
18 2802 with leave to amend his complaint); Holt v. Booth, 1 Cal.
19 App. 4th 1074, 1081 (1991) (holding that "[t]he cause of action

20 _____
21 ⁴California Labor Code section 2802 provides, in relevant
22 part:

23 (a) An employer shall indemnify his or her
24 employee for all necessary expenditures or
25 losses incurred by the employee in direct
26 consequence of the discharge of his or her
duties, or of his or her obedience to the
directions of the employer, even though
unlawful, unless the employee, at the time of
obeying the directions, believed them to be
unlawful.

1 for indemnification is dismissed as moot"). Mr. Gahan
2 has not brought a cause of action under section 2802, so the
3 Court will not decide the merits of such a claim.

4 **6. California Corporations Code Section 317(d)**

5 Mr. Gahan also requests indemnity under California
6 Corporations Code section 317(d).⁵ That provision requires a
7 corporation to indemnify the expenses of an employee who is
8 "successful on the merits in defense" of certain proceedings
9 involving the corporation. Cal. Corp. Code §§ 317(b)-(d). The
10 limitation on recovery to situations where the employee is
11 "successful on the merits" means that section 317(d) applies
12 "only where the actual merits of the defense have been judicially
13 determined." Groth Bros. Oldsmobile, Inc. v. Gallagher, 97 Cal.
14 App. 4th 60, 73 (2002); Am. Nat. Bank & Trust Co. v. Schigur, 83
15 Cal. App. 3d 790, 793 (1978). This requires "a showing that 'the
16 disposition reflects the opinion of the court or the prosecuting
17 party that the action would not succeed.'" Gorth Bros.
18 Oldsmobile, 97 Cal. App 4th at 73.

19 In any event, section 317(d) only entitles an employee to
20 indemnification where he "acted in good faith, in a manner the

21 ⁵California Corporations Code section 317(d) provides:

22
23 To the extent that an agent of a corporation
24 has been successful on the merits in defense
25 of any proceeding referred to in subdivision
26 (b) or (c) or in defense of any claim, issue,
or matter therein, the agent shall be
indemnified against expenses actually and
reasonably incurred by the agent in connection
therewith.

1 person believed to be in the best interests of the corporation."
2 Cal. Corp. Code §§ 317(b), (c). The stated purpose of the statute
3 is to "'to encourage capable individuals to serve' the
4 corporation." APSB Bancorp v. Thorton Grant, 26 Cal. App. 4th
5 926, 931 (1994). Mr. Gahan does not contend that he acted in the
6 best interests of OptiStreams in defending against OptiStreams'
7 claims. It appears that Mr. Gahan's only interest was in
8 avoiding personal liability. A decision in his favor could only
9 hurt OptiStreams by denying it recovery under its lawsuit.
10 Therefore, Mr. Gahan is not entitled to indemnity under section
11 317(d).

12 Accordingly, OptiStreams' Complaint is unconditionally
13 voluntarily dismissed.

14 **V. OptiStreams' Motion to Quash**

15 Mr. Gahan issued a subpoena to OptiStreams and its counsel
16 Trial & Technology Law Group ("TTLG") on January 23, 2006. The
17 subpoena sought billing records and records of payment for TTLG's
18 legal services. OptiStreams moved to quash the subpoena on the
19 grounds that it seeks privileged information, seeks only
20 irrelevant documents, was not properly served, and seeks
21 documents from a party. Because the court finds that the
22 subpoena seeks only irrelevant documents, it need not decide
23 whether OptiStreams' other objections have merit.

24 "On timely motion, the court by which a subpoena was issued
25 shall quash or modify the subpoena if it . . . subjects a person
26 to undue burden." Fed. R. Civ. P. 45(c)(3)(A). Courts have

1 decided whether a subpoena imposes an undue burden based on the
2 relevance on the material it seeks. Compaq Computer Corp. v.
3 Packard Bell Elecs., 163 F.R.D. 329, 335-36 (N.D. Cal. 1995);
4 N.Y. State Energy Research v. Nuclear Fuel Servs., 97 F.R.D. 709,
5 712 (W.D.N.Y. 1983). "[I]f the sought-after documents are not
6 relevant nor calculated to lead to the discovery of admissible
7 evidence, then any burden whatsoever imposed upon [the subpoenaed
8 party] would be by definition 'undue.'" Compaq Computer, 163
9 F.R.D. at 335-36.

10 Mr. Gahan alleges that the documents the subpoena seeks are
11 relevant to his request for an award of attorney's fees and costs
12 under Federal Rule of Civil Procedure 41(a)(2). As stated above,
13 the Court has concluded that Mr. Gahan is not entitled to an
14 award of attorney's fees under Rule 41. Accordingly, the
15 subpoena does not seek documents relevant for that purpose.

16 Mr. Gahan also claims that the documents concerning
17 OptiStreams' attorney's fees are relevant "[t]o the extent
18 OptiStreams claims its attorneys' fees as an aspect of its
19 damages in this case." Gahan's Opp'n to OptiStreams' Mot. to
20 Quash Subpoena. Mr. Gahan contends that OptiStreams does not
21 adequately describe what damages comprise the \$85,000 it claims
22 to have lost because of the computer-tampering incident. Because
23 these damages may include attorney's fees, Mr. Gahan posits, he
24 is entitled to subpoena records that detail these fees.

25 Mr. Gahan's claim that OptiStreams seeks attorney's fees as
26 damages for the computer tampering is pure speculation. He

1 points to nothing in the Complaint or any filing of OptiStreams
2 that indicates such a claim. Mr. Gahan's mere conjecture that
3 legal fees comprise that figure does not justify an order
4 requiring OptiStreams and TTLG to produce details of their legal
5 relationship. OptiStreams states that no portion of the \$85,000
6 in damages it sought were for its attorney's fees. OptiStreams
7 Reply in Supp. of Mot. to Quash Subpoena 2:22-25 n. 1. Moreover,
8 because the Court has authorized OptiStreams' unconditional
9 voluntary dismissal of its claims, details about the damages it
10 formerly sought are wholly irrelevant.

11 Accordingly, OptiStreams' motion to quash Mr. Gahan's
12 subpoena is GRANTED.

13 **VI. Mr. Gahan's Motion to Quash**

14 On January 23, 2006, OptiStreams issued a subpoena to
15 Sagaser, Jones & Hahey ("SJH"), counsel for Mr. Gahan. It
16 sought documents concerning details of SJH's legal representation
17 of Mr. Gahan. Mr. Gahan moved to quash the subpoena on the
18 grounds that the documents it seeks are privileged work product,
19 that the documents are not relevant to the proceeding, that the
20 subpoena is premature, and that OptiStreams issued the subpoena
21 to harass and annoy Mr. Gahan.

22 OptiStreams claims that the information it seeks is relevant
23 to determining whether and to what extent Mr. Gahan can recover
24 fees as a condition of OptiStreams' voluntary dismissal. Because
25 the Court has allowed OptiStreams to voluntarily dismiss the
26 Complaint without the condition that it pay Mr. Gahan's

1 attorney's fees or costs, the documents the subpoena seeks are
2 not relevant. Therefore, responding to the subpoena imposes an
3 undue burden on SJH. See Compaq Computer, 163 F.R.D. at 335-36.

4 Therefore, Mr. Gahan's motion to quash OptiStreams' subpoena
5 is GRANTED.

6 **ACCORDINGLY:**

7 1. Sean Gahan's Fourth Claim for Relief is DISMISSED
8 WITH PREJUDICE.

9 2. OptiStreams' Complaint is unconditionally DISMISSED
10 WITHOUT PREJUDICE.

11 3. Sean Gahan's request for costs is DENIED as premature.

12 4. Sean Gahan's request for attorney's fees is DENIED.

13 5. OptiStreams and TTLG's motion to quash the subpoena
14 Sean Gahan issued to them on January 23, 2006, is
15 GRANTED.

16 6. SJH's motion to quash the subpoena OptiStreams issued
17 on January 23, 2006, is GRANTED.

18
19 IT IS SO ORDERED.

20 **Dated: March 27, 2006**
21 810ha4

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE